Supreme Court, U. S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

IN THE UNITED STATES SUPREME COURT

WASHINGTON, D.C.
CASE NO.

79-1775

ROBERT J. KONDRAT
Petitioner

vs.

PAUL H. MITROVICH and STEPHEN J. FUTTERER
Respondents

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

In accordance with the following applicable subparagraphs of Rule 23 of the Supreme Court of the United States, Petitioner petitions this court for a writ of certiorari to review judgement of the State of Ohio Courts.

23a) In the official report delivered by the State of Ohio Court, Petitioner's appeal to that court was dismissed for the reason that no substantial constitutional question existed. Appended hereto is copy of same report.

23b) The date of the decree sought to be reviewed is March 14, 1980. The statutory provision conferred on this court to review the decree in question by writ of certiorari, is Article III of the Constitution of the United States, which created the Supreme Court as a constitutional court, giving judicial power to all cases, in law and equity, that arises under the Constitution.

23c) Question for review; Is the Imbler doctrine of absolute prosecutorial immunity applicable to prosecutors who derive criminal prosecutions from known fabricated probable cause, the fabrication of which is done intentionally to cause injury, and in which the prosecutors are participants as fabricators in concert with others, and in which the fabrication of probable cause was committed outside the prosecutors' quasi-judicial capacity and beyond the scope of duties that constitute an integral part of the judicial process?

23d) The constitutional provision which the case involves is the Fourteenth Amendment to the Constitution which guarantees due process of law.

23e) In December, 1977, Petitioner filed his Complaint in the Common Pleas Court, naming Respondents as defendants, and others who acted in concert with one or more of the named Respondents to create the circumstances which gave rise to the complaint itself. As appropriate, the complaint indicated the status of the named Respondents as elected and/or appointed public officials. These indications of public office, such as Prosecutor and Assitant Prosecuting Attorney,

are clearly factual statements relative to the legally recognizable status of the named Respondents.

The complaint alleges that the names Respondents, with or without the assistance of others, acted "together and in concert" during September, 1976 and thereafter to cause the arrest and prosecution of Petitioner. The complaint alleged that the named Respondents acted from the very incipient steps of investigating the situation to the final steps of trying the case without probable cause, for wrongful purposes, and in a malicious manner. Furthermore, the complaint indicated that Petitioner was arrested and incarcerated in the lake County Jail for a period of seven days. Thereafter, in July, 1977, Common Please Court directed a verdict in favor of Respondent after the State had put on its case. Thereafter, Petitioner went to court to seek a remedy to relieve

him of damages and injuries caused as a result of false arrest and wrongful prosecution. Subsequently, the Respondents submitted Motions to Dismiss. The motions were denied by the lower court. The Respondents then submitted Motions for Summary Judgement, pleading Imbler vs. Pachtman, 424 U.S. 409, (1976). The lower court returned a Judgement Entry sustaining the Respondents' Motion for Summary Judgement under the doctrine of Prosecutorial Immunity set forth in Imbler vs. Pachtman. Petitioner appealed the trial court's decision to the Eleventh Appellate District Court, citing that the trial court's Imbler application in this case extended the prosecutor's absolute immunity into the qualified zone, which was beyond the sphere recognized in Imbler and that this was not the meaning of the Imbler doctrine. The Appellate Court rendered a decision affirming the trial court's decision ruling

that actions of a prosecutor within his official parameters are clothed with immunity. Petitioner appealed this decision to the Ohio Supreme Court. The Ohio Supreme Court dismissed the appeal for reason that no Constitutional question existed.

23f) The Constitutional questions presented for the appeal in the Appellate Court were the First and Fourteenth Amendments to the Constitution. To the Ohio Supreme Court, in addition to already cited constitutional questions, the Preamble and the entire Constitution of the United States was presented as documents which were founded to prevent tyranny and to guarantee justice and freedom.

23g) Not applicable to this case.

23h) Prosecutors who know by virtue of the facts there is no basis for a criminal prosecution cannot be allowed to proceed with it

maliciously. In this case the prosecutors conspired with others to fabricate probable cause and suppressed material evidence that would have showed no basis for an indictment. Said suppression eventually was born out by a trial and dismissal of the charges against the accused. The courts have ruled that public policy allows prosecutors certain immunities. This must be balanced against the rights of individuals which are guaranteed by the Constitution of the United States.

In the Imbler vs. Pachtman decision this court ruled in a limited way on a given set of facts. The Imbler case differs from this case in that this case involves an attempt to recall public officials by a referendum petition circulated by citizens.

Admittedly, there is a legitimate and appropriate governmental interest in seeing to it that prosecuting attorneys may

operate under circumstances which enable them to carry out their duties to the fullest extent possible. However, this interest must be weighed against those which are infringed upon as a result of this protection afforded prosecutors.

The Fourteenth Amendment to the Constitution of the United States guarantees that no state shall deprive any person within its jurisdiction the equal protection of the laws. Yet, the granting of absolute immunity to prosecuting attorneys amounts to a denial of those guaranteed rights where such prosecutors are free to artibrarily act so as to deprive personal freedom and liberty to the enemies of the prosecutors' political friends and colleagues.

The Petitioner was imprisoned for his attempt to remove incumbent public officials by referendum petition. An attempt to recall public officials in not a crime in this state

nor in this nation. This Petitioner, in his attempt to recall various public officials, a lawful activity, is entitled to protection under the law the same as others engaged in lawful pursuits. Yet, Petitioner was arrested and deprived of his liberty simply because his lawful acts were offensive to public officials. Such deprivations of liberty are more suitable in dictatorships or totalitarian forms of government than in a democracy.

The Petitioner in the present case alleges that Respondents acted "maliciously and without probable cause" in injuring Petitioner. Thus, there exists an allegation of bad faith on the part of Respondents, which, if proved, should result in Respondents' action being deemed beyond the scope of their authority and, therefore, beyond the protection of the immunity granted them in their capacity as public officers.

Therefore, it may be said that:

a. To grant prosecuting attorneys absolute immunity yields results contrary to those intended by the decision in Imbler vs. Pachtman.

b. To grant prosecuting attorneys absolute immunity under the facts in this case would result in unconstitutional deprivations of equal protection and due process.

c. The results sought in Imbler can be achieved and constitutional protection can be retained by affording prosecutors a qualified immunity from civil liability and holding them responsible for intentional wrongdoing.

d. Prosecuting attorneys are public officers and, therefore, are entitled to only a qualified immunity which protects them only in the absence of a showing of bad faith.

Although grand juries make the decision as to whether or not to indict, it is the prosecuting attorneys who present to it the facts upon which they must base their decision. While the prosecuting attorney should not be personally responsible for those facts they present in the performance of their official duties, to

present false information and to suppress exculpatory evidence are acts inconsistant with their official duties. The grand jury is totally controlled, determined, and makes its decision on evidence selected, screened, and presented by the prosecutors. The prosecutors make a recommendation which they statistically and invariable follow. The foregoing is obvious to any observer of the criminal judicial scene. The horrendous part of this case is that the prosecutors, in conjunction with the law director of Willoughby Hills, and others, used and abused this grand jury for political purposes.

STATE OF OHIO, LAKE COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

FILED
COURT OF APPEALS
DEC 3 1979
MELVIN S. REED
CLERK OF COURT
LAKE COUNTY, OHIO

ROBERT J. KONDRAT,

PLAINTIFF-APPELLANT,

- VS -

PAUL MITROVICH and STEPHEN J. FUTTERER,

DEFENDANTS-APPELLEES.

CASE NO. 7-073

RECEIVED
DEC 4 1979

OPINION.

ROBERT J. KONDRAT,

PLAINTIFF-APPELLANT,

- VS -

BARRY M. BYRON, ET AL,

DEFENDANTS-APPELLEES.

CASE NO. 7-093

APPEARANCES.

Robert J. Kondrat, Pro Se, 29121 Chardon Road, Willoughby Hills, Ohio

Abraham Cantor, Painesville, Ohio for Defendants-Appellees.

Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio, JJ.,
of the Seventh Appellate District,
and
Hon. Sam H. Bell, J., of the
Eighth Appellate District, Sitting
by Assignment in the Eleventh
Appellate District.

Dated: December 3, 1979

O'NEILL, J.

This cause originated in the lower court when the present appellant, Robert J. Kondrat, filed a complaint naming Paul Mitrovich, Stephen Futterer, Barry Byron and other unnamed defendants.

The complaint alleged that at all times material thereto, Paul Mitrovich was the Prosecuting Attorney of Lake County, Ohio; Stephen Futterer was an Assistant Prosecuting Attorney of Lake County, Ohio; and Barry Byron was Law Director of the City of Willoughby Hills, Ohio.

The complaint further alleged that the unnamed defendants furnished various bits of information to Mr. Mitrovich and his assistants and that thereafter with this information each and all of the defendants caused Mr. Mitrovich by himself or through his assistant, Mr. Futterer, to cause the arrest of plaintiff on four counts of perjury. The complaint went on to allege that all charges were ultimately dismissed and that the arrests were false and wrongful causing damage to the plaintiff.

Defendants Mitrovich and Futterer filed a motion for summary judgment (10-19-78). Attached thereto were their affidavits affirming that all acts alleged in the complaint were performed by them in their official capacities and duties. The trial court sustained this motion on January 10, 1979. The court advanced as support for his judgment, the finding that defendants Mitrovich and Futterer were entitled to immunity in the performance of their official duties. Upon the matters before him, the pleadings and affidavits, the trial judge was not in error in his judgment. The complaint

alleged and defendants Mitrovich and Futterer admitted that at all pertinent times they were officially designated prosecutors. The U.S. Supreme Court has ruled that actions of a prosecutor within his official parameters are clothed with immunity. In the case of Imbler v. Pachtman, 47 L. Ed. 2d 128, the United States Supreme Court held that a state prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution was absolutely immune from a civil suit for deprivations of the defendants' constitutional rights. The court further held that such immunity was applicable even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt upon the state's testimony. The judgment of the trial court as to defendants Mitrovich and Futterer is affirmed.

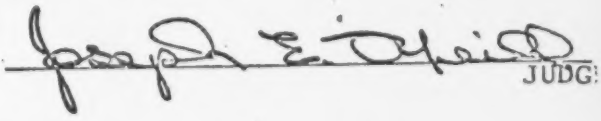
The complaint did not allege any specific acts as to defendant Barry Byron. It simply alleged "all of the Defendants" caused defendants Mitrovich and Futterer to bring about the arrest of plaintiff. Defendant Byron filed a "Request for Admissions" requesting the plaintiff to admit that he had not seen a person named Jack O. Yeager sign a re-call petition even though plaintiff, under oath, had sworn that he witnessed such signature. This "Request" was not answered. Pursuant to Rule 36, Ohio Rules of Civil Procedure, the failure to respond, amounted to an admission of perjury. On October 30, 1978, defendant Byron filed a motion for summary judgment citing to the court's attention the aforementioned admission. There was also attached to the motion an affidavit by Jack O. Yeager swearing that he had

never affixed his signature to the recall petition which plaintiff, under oath, had sworn he circulated and witnessed all signatures. There was also an affidavit by Marcille Yeager wherein she swore that she signed the signature of Jack O. Yeager to the petition but not in the presence of plaintiff Kondrat. There were also attached copies of four petitions bearing the plaintiff's jurat that he had witnessed all the signatures thereto. These copies were certified by the Clerk of Council for the City of Willoughby. Each petition bore the signature of Jack O. Yeager and it was these signatures he denied signing and these signatures were admittedly affixed by his wife. Plaintiff's response raised no probative nor credible rebuttal. The court sustained the motion, properly. The motion raised four instances of perjury. The plaintiff did not meet the issue. The complaint alleged four arrests for perjury. Upon the pleadings and affidavits, the trial court could reasonably conclude that there was probable cause to institute the arrests and that plaintiff was not entitled to judgment.

Judgment affirmed.

Donofrio, J., concurs.
Bell, J., concurs.

APPROVED:



Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio, JJ., Seventh District;
Hon. Sam H. Bell, Ninth District;
By Assignment to Eleventh District.

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

CASE NO. 77 CIV 0917

ROBERT J. KONDRAT)
)
PLAINTIFF)
)
VS) O P I N I O N
)
PAUL MITROVICH ET AL)
)
DEFENDANTS)

THE HONORABLE J. WARREN BETTIS, JUDGE

APPEARANCES:

MR. HERBERT BRAVERMAN, Cleveland, Ohio
ON BEHALF OF PLAINTIFF

MR. CHARLES E. COULSON, Painesville, Ohio
ATTORNEY FOR DEFENDANT FUTTERER

MR. PAUL MITROVICH, Willowick, Ohio
ON BEHALF OF DEFENDANT MITROVICH

MR. GEORGE HASKKELL, Painesville, Ohio
ON BEHALF OF DEFENDANT BYRON

MARY BANAR
ASSISTANT COURT REPORTER

THE COURT:

Plaintiff has brought an action for malicious prosecution and false arrest against the Prosecuting Attorney of Lake County, Ohio, an Assistant Prosecuting Attorney of said County, the Law Director of Willoughby Hills, Ohio, and certain unknown Defendants.

The Defendants have filed motions to dismiss for failure to state a claim upon which relief may be granted. Defendants Futterer and Mitrovich have also asked for Summary Judgment in the alternative.

The Defendants base their motions on the claim of absolute prosecutorial immunity. Defendants cite the case of Imbler v. Pachtman, 424 U.S. 409, 47 L. Ed. 2d 128 (1976) as being applicable herein.

The Imbler case dealt with a situation in which the Plaintiff had knowingly used false testimony and suppressed evidence, when the Plaintiff had been prosecuted for murder ten years earlier. The Plaintiff brought the action under 42 U.S.C. Section 1983 seeking damages for unlawful prosecution.

The Supreme Court discussed the necessity of protecting prosecutors from undue harassment and enabling them to retain independent judgment, and went on to hold that a State Prosecutor has absolute immunity under Section 1983 when he acts within the scope of his prosecutorial duties, i.e. when he performs acts permitted by law.

The Court, however, distinguished between activities which are an integral part of the judicial process (Prosecutor's

role as advocate in initiating prosecution and presenting the case) and those which are performed by the prosecutor in the role of administrator or investigator.

In this regard, the Supreme Court stated with reference to the Ninth Circuit Court of Appeals opinion below:

"The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than the respondent's status was to distinguish and leave standing those cases, in its circuit and some others, which hold that a prosecutor engaged in certain investigative activities enjoys not the absolute immunity associated with the judicial process, but only a good faith defense comparable to a policeman's. ...We agree with the Court of Appeals... 424 U.S. 409, at 430.

Thus, in some instances a prosecutor is entitled only to a qualified, good faith immunity, rather than an absolute one. See, Williams vs. Wright, 432 F. Supp. 732 (1976); Helstoski v. Goldstein, 552 F. 2d 564 (3rd Cir. 1977).

For this reason, the Court finds that it is necessary to hear more evidence in this case to determine what type of alleged prosecutorial activity is involved herein.

The Court notes that defendants Mitrovich and Futterer also claim as a basis for dismissal the fact that the warrant to arrest Plaintiff was issued pursuant to a Grand Jury indictment. This fact does not alter the Court's conclusion.

Therefore, the Motions to dismiss made by Defendants Mitrovich, Futterer and Byron are denied.

Insofar as an issue of fact does exist in the within case, the motions made by Defendants Mitrovich and Futterer for summary judgment are also denied.

J. WARREN BETTIS, JUDGE

DATED: May 23, 1978

STATEMENT OF ASSIGNMENT OF ERROR

Plaintiff-Appellant asks that the Appellate Court reverse the lower Court's Judgement Entry sustaining the Defendant-Appellees Motion for Summary Judgement, because the Imbler vs. Pachtman, 424 U.S. 409, 1976, doctrine of Prosecutorial Immunity, as applied by the lower Court, is not applicable. The lower Court's application in this case, extends the prosecutors' absolute immunity into the qualified zone, which is beyond the sphere recognized in Imbler. This is not the meaning of the Imbler doctrine.

SC-10A 79-10-1 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

RECEIVED MAR 17 1980

THE STATE OF OHIO,
City of Columbus.

Robert J. Kondrat,
Appellant,

vs.

Paul Mitrovich et al.,
Appellees.

*19*80 *TERM*

To wit: March 14, 1980

No. 80-74

APPEAL FROM THE COURT OF APPEALS

for LAKE *County*

This cause, here on appeal as of right from the Court of Appeals for LAKE *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

FILED
COURT OF APPEALS
DEC 3 1979
MELVIN S. REED
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

RECEIVED
DEC 4 1979

ROBERT J. KONDRAT,

Appellant

- vs -

PAUL MITROVICH, ET AL.,

Appellees

JUDGMENT ENTRY

CASE NO. 7-073

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JUDGE JOSEPH E. O'NEILL, Seventh District, Sitting by Assignment
FOR THE COURT

-21-

(JOSEPH DONOFRIO, Seventh District; SAM H. BELL, Ninth District, By Assignment to Eleventh District)

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

ROBERT J. KONDRAT	)	
	)	
PLAINTIFF	)	CASE NO. 77 CIV 0917
	)	
VS	)	JUDGE: J. WARREN BETTIS
	)	
PAUL MITROVICH ET AL	)	
	)	JUDGMENT ENTRY
DEFENDANT	)	

Motions to dismiss made by Defendants Mitrovich, Futterer and Byron are denied.

Motions of Futterer and Mitrovich for Summary Judgment are denied.

See Opinion.

J. WARREN BETTIS, JUDGE

DATED: May 23, 1978

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JAN 15 1979

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

ROBERT J. KONDRAT)
)
PLAINTIFF)
) CASE NO. 77 CIV 0917
VS)
) JUDGMENT ENTRY
PAUL MITROVICH, ET AL)
)
DEFENDANTS)

This matter comes on for decision after hearing Defendants Paul H. Mitrovich and Stephen J. Futterer Motion for Summary Judgment.

It appearing to the Court that at the time of the conduct complained of, Paul H. Mitrovich was the Prosecuting Attorney for Lake County, Ohio, and that Stephen John Futterer was Assistant County Prosecutor for Lake County, Ohio, Defendants' Motion for Summary Judgment is sustained under the doctrine of Prosecutorial Immunity set forth in Imbler vs. Pachtman, 424 U.S. 409, (1976).

The Court further finds that there is no just reason for delay of this judgment.

Costs taxed against Plaintiff.

/s/ J. Warren Bettis
J. WARREN BETTIS, JUDGE

DATED: January 8, 1979

I hereby certify that the foregoing is a true copy of [illegible] filed on 1-10-79 in 77-CIV-0917 of Lake Co. Common Pleas Court. Witness my signature and seal of said Court this 10 day of January; 19 79
Melvin S. Reed, Clerk of Courts
By: [illegible] Deputy Clerk

SERVICE

A copy of the foregoing PETITION FOR WRIT OF CERTIORARI was mailed by regular United States mail, first class postage prepaid, on this 5th day of May, 1980 to the attorney for Respondents, James F. Sweeney, 630 Bulkley Bldg., Cleveland, Ohio 44115

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Willoughby Hills, Ohio
44092

cc: News Media

Supreme Court, U. S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979
No. 79-1775

ROBERT J. KONDRAT,
Petitioner,

vs.

PAUL MITROVICH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1979
No. 79-1775

ROBERT J. KONDRAT,
Petitioner,

vs.

PAUL MITROVICH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Petitioner Robert Kondrat filed his Complaint in the Court of Common Pleas of Lake County, Ohio alleging that the Respondents Mitrovich (while the Lake County Prosecutor) and Futterer (while an Assistant Lake County Prosecutor) caused his "false and wrongful arrest."

REASONS FOR DENYING THE WRIT

PROSECUTING ATTORNEYS ACTING WITHIN THEIR OFFICIAL CAPACITIES ARE IMMUNE FROM SUIT FOR MALICIOUS PROSECUTION

The common law recognizes an absolute immunity protecting prosecuting attorneys from civil suit for malicious prosecution. *Cooper v. O'Connor,* 99 F.2d 135 (D.C. App. 1938), *cert. den.* 305 U.S. 643 (1938). The rationale of the rule was explained by this Court in *Imbler v. Pachtman,* 424 U.S. 409 (1976):

> The same considerations of public policy that underlie the common-law rule of absolute immunity of a prosecutor from a suit for malicious prosecution likewise dictate absolute immunity under §1983. Although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would disserve the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system and would often prejudice criminal defendants by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.

The case at bar does not involve an alleged violation of 42 U.S.C. §1983. Rather, Petitioner's Complaint alleged only the common-law tort of malicious prosecution. The Respondents thus would have been immune even prior to *Imbler.*

The facts relative to Respondents' immunity are not in dispute. Petitioner's Complaint itself alleged that the Respondents acted in their capacity as County Prosecutor and Assistant County Prosecutor. The law has long been clear that the Respondents are immune while acting in their official capacities. The Ohio Court of Common Pleas and Court of Appeals correctly held that the Respondents were entitled to summary judgment based upon the undisputed facts. The Ohio Supreme Court correctly determined that this action presents no substantial Constitutional question. It is submitted that the Petitioner has cited no reason why this Honorable Court should abrogate the common-law immunity of prosecuting attorneys which exists universally in American jurisdictions.

It is therefore respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WALLACE R. STEFFEN
JAMES F. SWEENEY
NEIL E. ROBERTS
GALLAGHER, SHARP, FULTON, NORMAN AND MOLLISON
Attorneys for Respondents

see 79

1710